



State of New Jersey  
DEPARTMENT OF COMMUNITY AFFAIRS  
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CHRIS CHRISTIE  
Governor  
  
KIM GUADAGNO  
Lt. Governor

CHARLES A. RICHMAN  
Commissioner

INTERIM ORDER

December 15, 2015 Government Records Council Meeting

Robert A. Verry  
Complainant

Complaint No. 2015-126

v.

Township of Greenwich (Warren)  
Custodian of Record

At the December 15, 2015 public meeting, the Government Records Council (“Council”) considered the December 8, 2015 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian’s failure to respond immediately to the Complainant’s OPRA request resulted in a violation of OPRA’s immediate access provision. N.J.S.A. 47:1A-5(e); Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). Additionally, the Custodian did not bear her burden of proof that she timely responded to the remainder of Complainant’s OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian’s failure to respond in writing to the Complainant’s OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a “deemed” denial of the Complainant’s OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The GRC must conduct an *in camera* review of the undisclosed records in order to validate the Custodian’s assertions that the documents withheld are, in fact, exempt from disclosure based on OPRA’s exemptions attorney-client privileged and work product information, pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>1</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #2 above), a document or redaction index<sup>2</sup>, as well as a legal certification from the Custodian, in accordance with**

<sup>1</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>2</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.



**N.J. Court Rule 1:4-4,<sup>3</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the  
Government Records Council  
On The 15<sup>th</sup> Day of December, 2015

Robin Berg Tabakin, Esq., Chair  
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary  
Government Records Council

**Decision Distribution Date: December 16, 2015**

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<sup>3</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY  
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director  
December 15, 2015 Council Meeting**

**Robert A. Verry<sup>1</sup>  
Complainant**

**GRC Complaint No. 2015-126**

**v.**

**Township of Greenwich (Warren)<sup>2</sup>  
Custodial Agency**

**Records Relevant to Complaint:**

- 1) A copy of all 2013 Purchase Orders, invoices, and attachments for Francesco Taddeo, Esq., of Somerville, New Jersey.
- 2) A copy of all 2014 Purchase Orders, invoices, and attachments for Francesco Taddeo, Esq., of Somerville, New Jersey.
- 3) A copy of all January 1, 2015-April 20, 2015 Purchase Orders, invoices, and attachments for Francesco Taddeo, Esq., of Somerville, New Jersey.

**Custodian of Record:** Kimberly D. Viscomi

**Request Received by Custodian:** April 21, 2015

**Response Made by Custodian:** None

**GRC Complaint Received:** May 4, 2015

**Background<sup>3</sup>**

**Request and Response:**

On April 21, 2015, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. The Complainant received no written response to the request within seven (7) business days.

**Denial of Access Complaint:**

On May 1, 2015, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the Custodian did not grant access, deny access, seek clarification, or request an extension of time within OPRA's

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<sup>1</sup> Represented by John A. Bermingham, Jr., Esq. (Mt. Bethel, PA).

<sup>2</sup> Represented by Francesco Taddeo, Esq.

<sup>3</sup> The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

statutorily mandated seven (7) business days. The Complainant argued that the “preponderance of all credible evidence” suggested that the Custodian did not deny the Complainant access to the requested records carelessly but rather “knowingly, purposefully, and willfully.” The Complainant argued that the GRC should: 1) find that the Custodian knowingly and willfully violated OPRA and unreasonably denied the Complainant access to the requested records, thereby warranting the assessment of a civil penalty; 2) order the release of all responsive records relevant to the Complainant’s validly submitted OPRA request; 3) find that the Complainant is a prevailing party; 4) find that the Complainant is awarded his attorney’s fees; 4) find that the instant complaint is a “deemed denial”; and 5) find further relief as deemed proper.

#### Statement of Information:

On May 29, 2015, the Custodian filed a Statement of Information (“SOI”). The Custodian certified that she received the Complainant’s OPRA request on April 21, 2015. The Custodian certified that she ultimately responded to the request on May 29, 2015, by providing all records to the Complainant, with appropriate redactions to the invoices, citing attorney-client privileged and work product information. N.J.S.A. 47:1A-1.1. The Custodian asserted no other legal arguments.

#### Additional Submissions:

On May 28, 2015, the Complainant filed an additional submission with the GRC, reasserting the arguments proffered in the Denial of Access Complaint and additionally stating that the invoices sought were “immediate access records,” pursuant to N.J.S.A. 47:1A-5e.

On June 10, 2015, the Complainant filed an additional submission, objecting to the Custodian’s assertion of “blanket privileges” for redactions. The Complainant further argued that the Custodian failed to identify which statutory exemptions were being claimed for each redaction and failed to “explain how disclosure would damage the interests protected by the claimed exemption.” The Complainant argued that in light of the foregoing facts, the GRC must conduct an *in camera* review to address the veracity of every redaction. The Complainant additionally argued that the attorney-client privilege cited by the Custodian is not absolute, pursuant to In re Kozlov, 79 N.J. 232 (1979); Hammock v. Hoffman-LaRoche, Inc., 142 N.J. 356 (1995); Kinsella v. Kinsella, 150 N.J. 276 (1997); and Keddie v. Rutgers, State University, 148 N.J. 36 (1997).

### Analysis

#### Timeliness

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5(i). A custodian’s failure to respond within the required seven (7) business days results in a “deemed” denial. Id. Further, a custodian’s response, either granting or denying access, must be in writing pursuant to

N.J.S.A. 47:1A-5(g).<sup>4</sup> Thus, a custodian's failure to respond in writing to a complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).

Furthermore, OPRA contains a separate response time for certain records. Specifically, OPRA states that immediate access ordinarily shall be granted to "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5(e). When immediate access records are requested, a custodian must respond to the request for those records immediately, granting or denying access, requesting additional time to respond, or requesting clarification of the request. Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007).

Here, the Complainant's April 21, 2015 request sought copies of "purchase orders, invoices, and attachments." Although the Complainant requested a type of immediate access records listed at N.J.S.A. 47:1A-5(e), the Custodian did not respond until May 29, 2015. Additionally, the Custodian's acknowledges in her own certification that she ultimately responded to the request on May 29, 2015, by providing all requested records, with redactions, to the Complainant.

Accordingly, the Custodian's failure to respond immediately to the Complainant's OPRA request resulted in a violation of OPRA's immediate access provision. N.J.S.A. 47:1A-5(e); Herron, GRC 2006-178. Additionally, the Custodian did not bear her burden of proof that she timely responded to the remainder of Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley, GRC 2007-11.

### **Unlawful Denial of Access**

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request "with certain exceptions." N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the GRC, which dismissed the complaint by accepting the custodian's legal conclusion for the denial of access without further review. The court stated that:

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<sup>4</sup> A custodian's written response, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, even if said response is not on the agency's official OPRA request form, is a valid response pursuant to OPRA.

OPRA contemplates the GRC's meaningful review of the basis for an agency's decision to withhold government records . . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.

Paff, 379 N.J. Super. at 354.

The court also stated that:

The statute . . . contemplates the GRC's *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the Open Public Meetings Act, N.J.S.A. 10:4-6 to 10:4-21, it also provides that the GRC "may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed." N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

Id. at 355.

Further, the court stated that:

We hold only that GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal...There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

Id.

Here, the Custodian has argued that the responsive attorney invoices provided to the Complainant were redacted pursuant to N.J.S.A. 47:1A-1.1, as attorney-client privileged and work product information. Without inspecting the withheld records, and in light of the Custodian's burden to prove a lawful denial of access, the GRC cannot conduct the "meaningful review of the basis for an agency's decision to withhold government records" contemplated under OPRA. Id. at 354.

Therefore, the GRC must conduct an *in camera* review of the undisclosed records in order to validate the Custodian's assertions that the documents withheld are, in fact, exempt from disclosure based on OPRA's exemptions attorney-client privileged and work product information, pursuant to N.J.S.A. 47:1A-1.1.

### **Knowing & Willful**

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

### **Prevailing Party Attorney's Fees**

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

### **Conclusions and Recommendations**

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to respond immediately to the Complainant's OPRA request resulted in a violation of OPRA's immediate access provision. N.J.S.A. 47:1A-5(e); Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). Additionally, the Custodian did not bear her burden of proof that she timely responded to the remainder of Complainant's OPRA request. N.J.S.A. 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request, either granting access, denying access, seeking clarification, or requesting an extension of time within the statutorily mandated seven (7) business days, results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5(g), N.J.S.A. 47:1A-5(i), and Kelley v. Twp. of Rockaway, GRC Complaint No. 2007-11 (Interim Order October 31, 2007).
2. The GRC must conduct an *in camera* review of the undisclosed records in order to validate the Custodian's assertions that the documents withheld are, in fact, exempt from disclosure based on OPRA's exemptions attorney-client privileged and work product information, pursuant to N.J.S.A. 47:1A-1.1.
3. **The Custodian must deliver<sup>5</sup> to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see #2 above), a document or redaction index<sup>6</sup>, as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,<sup>7</sup> that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

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<sup>5</sup> The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

<sup>6</sup> The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

<sup>7</sup> "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Husna Kazmir  
Staff Attorney

Reviewed By: Joseph D. Glover  
Executive Director

December 8, 2015